Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli & Anor v Mohamad bin Nohing (Batin Kampung Bukit Rok) & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS C-01–45–02 OF 2013 AND C-01–85–03 OF 2013
ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA
13 OCTOBER 2015

Native Law and Custom — Land dispute — Customary rights over land — Whether claim to customary land included only areas settled, cultivated and exclusively occupied and continuously used by aborigines — Whether claim could not include general forest areas used for roaming and foraging — Whether exclusive occupation by aboriginal group could be demonstrated by existence of sufficient control measures to prevent interference from strangers — Whether enactment gazetting area as Malay reserve land extinguished aboriginal group's pre-existing native customary rights to that land absent clear and unequivocal legislation to that effect

Asserting that they had native customary rights ('NCR') to lands in Padang Kepayang, Kampung Bukit Rok and Kampung Ibam in Mukim Bera, Pahang, the respondents, who belonged to the Semelai tribe, sought orders of certiorari and prohibition and several declarations together with consequential orders from the High Court against the four appellants herein when they were told to quit their lands following upon an approval of large tracts of their settlement lands to FELCRA to cultivate oil palm. The High Court held the respondents had proven that they had inherited unextinguished and legally enforceable NCR and interests to the lands from their ancestors well before the FELCRA scheme came into being and before a huge part of the lands was *gazetted* as Malay reserve land in 1923. The High Court ordered the portion of Malay reserve land that encroached upon the respondents' customary lands to be *de-gazetted* and directed FELCRA to vacate areas of customary land it occupied. The court also directed the Pahang State Government and its director of lands and mines to identify and draw up the boundaries of the customary lands using the natural boundaries of rivers and hills and to take steps to *gazette* those lands. The High Court ruled that the area of land to be alienated for the purposes of the respondents should be made on the basis of the size of their community and the extent to which they were allowed to roam and forage. In their instant appeals against the decision of the High Court, the appellants contended that, inter alia: (a) under common law customary land was limited to settled areas and excluded forest areas used for hunting, roaming

and foraging; in that regard, the High Court was wrong to allow the respondents' claim over lands used for roaming and foraging; (b) the key factor in determining the claim to customary land was continuous occupation; the respondents were not in continuous occupation of the disputed lands in Padang Kepayang and had only used them for roaming and foraging; (c) the High Court had no jurisdiction to order the Malay reserve land to be *de-gazetted* as the power to revoke the status of Malay reserve land lay in the hands of the Menteri Besar in consultation with the Ruler in Council. The instant appeal turned on whether NCR extended to lands used for hunting, roaming and foraging and whether *gazetted* Malay reserve land took precedence over customary title.

Held, allowing the appeal in part and varying the order of the High Court:

(1) The area of land to be alienated for the purposes of the aborigine community should be the settled areas and areas they had planted with rubber, oil palm or other trees. Accordingly, the order of the High Court was varied to the extent the identification and drawing of boundaries of the respondents' customary land using natural boundaries of rivers and hills should correspond as closely as possible to the area claimed. The High Court misdirected itself on the law and on the facts when it found that the area of the land to be alienated for the purposes of the aborigine community should include areas where they roamed and foraged (see paras 42 & 60).

(2) The court agreed with the appellants' contention that NCR was established by the aboriginal occupation of the subject land. The distinction between settled and unsettled lands was not important; what was more significant was whether there was exclusive occupation and continuous use of the subject land. Whilst actual physical presence on the land was not necessary, there could be occupation without physical presence provided there was sufficient measure of control to prevent strangers from interfering. In this case, the respondents did not produce any evidence to show that there existed sufficient, let alone any, measure of control to prevent strangers from interfering on the land. In fact, the first respondent admitted under cross-examination that he did not know the extent of area used for roaming and foraging in Padang Kepayang thus lending support to the appellants' argument that the respondents did not have any measure of control at all on the disputed land in Padang Kepayang (see paras 40–41).

(3) Given that the Semelai of Bukit Rok and Ibam had been living on the customary lands for at least eight generations, it could be inferred that they had occupied those lands for at least 240 years; that is to say, since 1775. Malaysian courts recognised the pre-existing native land rights of aboriginal peoples. In this case, the Malay reserve land was *gazetted* in

1923 pursuant to the Malay Reservations Enactment 1913. That Enactment made no reference to customary land and nothing in it stated that Malay reserve land took precedence over customary land. In the absence of a clear and unequivocal legislative intent to extinguish native customary land rights, the declaration under the 1913 Enactment of the Bera Malay reservation did not extinguish the customary land rights of the aboriginal peoples. Accordingly, the High Court's order that that portion of Malay reserve land which encroached upon the customary land of the respondents be de-*gazetted* was upheld (see paras 46–47, 51, 57 & 59).

[Bahasa Malaysia summary

Dengan menegaskan bahawa mereka mempunyai Hak Adat Anak Negeri ('HAAN') untuk tanah di Padang Kepayang, Kampung Bukit Rok dan Kampung Ibam di Mukim Bera, Pahang, responden-responden yang termasuk dalam kaum Semelai itu, menuntut perintah certiorari dan larangan dan beberapa deklarasi bersama-sama dengan perintah berbangkit daripada Mahkamah Tinggi terhadap empat perayu di sini apabila mereka diberitahu untuk melepaskan tanah mereka berikutan satu kelulusan untuk sebuah kawasan besar untuk tanah-tanah penempatan mereka kepada FELCRA untuk penanaman kelapa sawit. Mahkamah Tinggi memutuskan responden-responden telah membuktikan bahawa mereka telah mewarisi HAAN yang tidak boleh dipadamkan dan boleh dikuatkuasakan dan kepentingan dalam tanah tersebut daripada nenek moyang mereka sebelum skim FELCRA itu diperkenalkan dan sebelum sebahagian besar tanah-tanah tersebut diwartakan sebagai Tanah Rizab Melayu pada tahun 1923. Mahkamah Tinggi mengarahkan sebahagian daripada Tanah Rizab Melayu yang menceroboh tanah adat responden-responden dibatalkan pewartaannya dan mengarahkan FELCRA untuk mengosongkan kawasan-kawasan tanah adat yang didudukinya. Mahkamah juga mengarahkan Kerajaan Negeri Pahang dan Pengarah Tanah dan Galian untuk mengenal pasti dan merangka sempadan tanah adat menggunakan sempadan semula jadi sungai dan bukit-bukit dan mengambil langkah-langkah untuk mewartakan tanah-tanah tersebut. Mahkamah Tinggi memutuskan bahawa kawasan tanah untuk diberi hak milik bagi tujuan responden-responden perlu dibuat berdasarkan saiz komuniti mereka dan sejauh mana mereka dibenarkan untuk merayau dan mencari makanan. Dalam rayuan mereka ini terhadap keputusan Mahkamah Tinggi, perayu menghujah, antara lainnya: (a) di bawah undang-undang biasa tanah adat terhad kepada kawasan yang diduduki dan mengecualikan kawasan hutan yang digunakan untuk memburu, merayau dan mencari makanan; sehubungan dengan itu, Mahkamah Tinggi terkhilaf dalam membenarkan tuntutan responden ke atas tanah yang digunakan untuk merayau dan mencari makanan; (b) faktor utama dalam menentukan tuntutan itu kepada tanah adat adalah pekerjaan yang berterusan; responden-responden tidak berada dalam pendudukan berterusan tanah-tanah yang dipertikaikan di Padang Kepayang

dan hanya menggunakan tanah tersebut untuk merayau dan mencari makanan (c) Mahkamah Tinggi tidak mempunyai bidang kuasa untuk memerintahkan Tanah Rizab Melayu untuk dibatalkan pewartaannya memandangkan kuasa untuk membatalkan status Tanah Rizab Melayu terletak pada Menteri Besar selepas berunding dengan Raja di dalam Majlis. Rayuan ini dikemukakan sama ada HAAN diperluaskan ke tanah-tanah yang digunakan untuk memburu, merayau dan mencari makanan dan sama ada pewartaan Tanah Rizab Melayu mendahului tanah adat.

Diputuskan, sebulat suara membenarkan rayuan sebahagiannya dan membezakan perintah Mahkamah Tinggi:

(1) Kawasan tanah untuk beri hak milik bagi tujuan komuniti orang asli adalah kawasan yang boleh diduduki dan kawasan di mana mereka telah menanam pokok getah, kelapa sawit atau pokok-pokok lain. Oleh itu, perintah Mahkamah Tinggi telah diubah setakat pengenalan dan lukisan sempadan tanah adat responden menggunakan sempadan semula jadi sungai dan bukit-bukit harus sesuai dengan kawasan yang dituntut. Mahkamah Tinggi dengan sendirinya terkhilaf dari segi undang-undang dan fakta apabila mendapati bahawa kawasan tanah yang diberi milik bagi tujuan komuniti orang asli itu perlulah termasuk kawasan di mana mereka berkeliaran dan mencari makanan (lihat perenggan 42 & 60).

(2) Mahkamah bersetuju dengan hujahan perayu bahawa HAOA telah ditubuhkan oleh pendudukan orang asli di tanah subjek. Perbezaan antara tanah yang diduduki dan tanah tidak diduduki adalah tidak penting; apa yang lebih penting ialah sama ada terdapat pendudukan eksklusif dan penggunaan berterusan tanah subjek. Walaupun kehadiran fizikal sebenar di atas tanah adalah tidak penting, mungkin terdapat pekerjaan tanpa kehadiran fizikal dengan syarat terdapat kaedah-kaedah kawalan yang mencukupi untuk mengelakkan orang yang tidak dikenali daripada memasuki. Dalam kes ini, responden-responden tidak mengemukakan apa-apa bukti yang menunjukkan bahawa wujud kaedah-kaedah kawalan yang mencukupi, apatah lagi apa-apa, langkah kawalan untuk mencegah orang yang tidak dikenali daripada memasuki tanah tersebut. Malah, responden pertama mengakui di bawah pemeriksaan balas bahawa dia mengetahui sejauh mana kawasan yang digunakan untuk merayau dan mencari makanan di Padang Kepayang yang dengan itu memberi sokongan kepada hujahan perayu bahawa responden tidak mempunyai apa-apa langkah kawalan di semua tanah yang dipertikaikan di Padang Kepayang (lihat perenggan 40–41).

(3) Memandangkan Semelai Bukit Rok dan Ibam telah tinggal di tanah-tanah adat untuk sekurang-kurangnya lapan generasi, boleh disimpulkan bahawa mereka telah menduduki tanah-tanah tersebut untuk sekurang-kurangnya 240 tahun; iaitu, sejak 1775. Mahkamah

Malaysia mengiktiraf hak-hak tanah adat orang-orang asli yang sedia ada. Dalam kes ini, Tanah Rizab Melayu telah diwartakan pada tahun 1923 selaras dengan Enakmen Rizab Melayu 1913. Enakmen tersebut tidak merujuk kepada tanah adat dan tiada apa-apa di dalamnya yang menyatakan bahawa Tanah Rizab Melayu lebih utama daripada tanah adat. Dalam ketiadaan tujuan perundangan yang jelas dan adil untuk memadamkan hak tanah adat, pengisytiharan di bawah Enakmen 1913 daripada Rizab Melayu Bera tidak memadamkan hak tanah adat orang asli. Oleh itu, perintah Mahkamah Tinggi bahawa bahagian daripada Tanah Rizab Melayu yang menceroboh tanah adat responden-responden untuk membatalkan pewartaan dikekalkan (lihat perenggan 46–47, 51, 57 & 59).]

Notes

For cases on customary rights over land, see 10(1) *Mallal's Digest* (5th Ed, 2015) paras 736–779.

Cases referred to

Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)
Alexkor Ltd v Richetersveld Community [2003] 12 BCLR 130 (refd)
Amodu Tijani v Southern Nigeria Secretary [1921] 2 AC 399, PC (refd)
Calder v A-G (British Columbia) [1973] SCR 313, SC (refd)
Delgamuukw v British Columbia (1991) 79 DLR, SC (refd)
First Nations Summit et al, interveners (1997) 153 DLR, SC (refd)
Johnson and Graham's Lessee v William M'Intosh (1823) 21 US 681, SC (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)
Mabo (No 2) [1992] 175 CLR 1, HC (refd)
Mabo v State of Queensland (1993) 175 CLR 1, HC (refd)
Sagong bin Tasi v Kerajaan Negeri Selangor & Ors [2002] 2 MLJ 591, HC (refd)
Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong) [2008] 2 MLJ 677, FC (refd)
Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256; [2005] 3 CLJ 555, CA (refd)
Wik Peoples v The State of Queensland & Ors, HC (1996) 187 CLR 1, HC (refd)

Legislation referred to

Aboriginal Peoples Act 1954 s 10
Federal Constitution arts 8(5)(c), 13, 89(1), (3), (4)
Forest Rules 1987 rr 2, 5
Land Acquisition Act 1960

Malay Reservations Enactment 1913 s 13
National Forestry Act 1984

Appeals from: Judicial Review No 25–4 of 2007 (High Court, Temerloh)

Shamsul bin Bolhassan (Kamal Azira bin Hasan, Mazlifah bt Ayob with him) (Federal Counsel, Attorney General's Chambers) in Civil Appeal No C-01-45-02 of 2013 for the appellant.
Ahmad Hanir bin Hambaly (State Legal Advisor, Legal Advisor's Office of Pahang) in Civil Appeal No C-01-85-03 of 2013 for the appellant.
Lim Heng Seng (Yogeswaran Subramaniam and Tan Hooi Ping with him)(Lee Hishammuddin Allen & Gledhill) in Civil Appeal No C-01-45-02 of 2013 for the respondent.
Lim Heng Seng (Yogeswaran Subramaniam and Tan Hooi Ping with him)(Lee Hishammuddin Allen & Gledhill) in Civil Appeal No C-01-85-03 of 2013 for the respondent

Vernon Ong JCA:

INTRODUCTION

[1] The appeals stem from the decision of the High Court given on 19 December 2012 granting several declarations pertaining to the respondents' claim of native customary lands. The High Court also made consequential orders including the following:

(a) directing the Director of Land and Mines, State of Pahang and the Pahang State Government to identify and draw the boundaries of the claim using natural boundaries of rivers and hills and to take steps to *gazette* the customary land of the respondents;

(b) the land utilised by FELCRA that encroaches upon the customary lands to be vacated and the boundaries set up to be removed at FELCRA's costs; and

(c) the portion of the Malay reserve land encroaching upon the customary lands has to be *de-gazetted*;

[2] Appeal No 85 is the appeal by the Director of Land and Mines, State of Pahang and the Pahang State Government ('the state appellants'). Appeal No 45 is the appeal by the Director General of the Department of Orang Asli Affairs and the Government of Malaysia ('the federal appellants').

[3] Both appeals were heard together on 7 August 2015. After hearing of counsel for the parties, we adjourned the proceedings to a date to be fixed for the delivery of our decision. We now give our grounds of decision.

A THE SALIENT FACTS

[4] The respondents are Semelai tribe aboriginal peoples residing at the settlement area of Kampong Bukit Rok and Kampung Ibam, Mukim Bera, Pahang.

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[5] The respondents' claim of native customary lands includes three areas called Padang Kepayang, Kampung Bukit Roh and Kampung Ibam.

C **[6]** On 20 December 2000, the state appellants approved 500 acres (202.3 hectares) of land situated at Padang Kepayang, Kampung Batu Papan, Mukim Bera, Daerah Bera, Pahang for the purposes of cultivating oil palm trees to be undertaken by FELCRA.

D **[7]** On or about 12 March 2007, several of the respondents were issued a eviction notice intituled 'PENDUDUKAN TANAH KERAJAAN TANPA KEBENARAN PIHAK BERKUASA NEGERI' addressed to the respondents occupying the area known as Padang Kepayang. The respondents were required to remove huts and/or buildings erected on Padang Kepayang and to E leave Padang Kepayang within 14 days of the eviction notice.

[8] As a result, the respondents filed an application for judicial review against the state appellants and the federal appellants at the Temerloh High Court on 19 April 2007 seeking, inter alia, an order of certiorari, a prohibitory order and F several declarations together with consequential orders.

FINDINGS OF THE HIGH COURT

[9] The learned judge made the following findings of fact:

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(a) the Semelais are an identifiable native aborigine group who have existed in the Bera region for a very considerable period of time;

(b) the respondents are the descendants of the Semelais; and

H (c) the area claimed has been amply identified.

[10] The learned judge also held that the respondents' rights over the lands accrued to the Semelais the minute they set foot in the Bera region. Any other alienation after the period where the right first accrued is illegal; this includes I the area *gazetted* as Malay reserve land in 1923 and the setting up of the FELCRA scheme.

[11] The learned judge further held that the area of the land to be alienated for the purpose of the aborigine community should be made on the basis of the

size of the community and the extent they should be allowed to roam and forage.

SUBMISSION OF PARTIES

[12] Learned counsel for the state appellants and the federal appellants canvassed their appeals on two main grounds.

State appellant's submission

[13] The first argument advanced by counsel for the state appellant is that the customary land is limited to the settlement area and excludes the forest at large for hunting, roaming and foraging.

[14] Learned counsel argued that the learned judge erred in law and fact in allowing the respondents' claim over the disputed land for roaming and foraging. Whilst conceding that the common law is applicable, learned counsel argued that common law only recognises the claim of customary lands to areas which form their settlement and not the area where they used to roam and forage in the jungle (*Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 (CA), *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256; [2005] 3 CLJ 555 (CA)).

[15] Learned counsel further argued that the key factor in determining the extent of customary land is continuous occupation (*Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 (FC)). The respondents had moved from Padang Kepayang for good since 1971. As the respondents only use Padang Kepayang for roaming and foraging in the jungle there is no continuous occupation over the disputed area of Padang Kepayang since 1971.

[16] The learned judge's finding is not based on the land inherited from the forefathers; but based on the size of the community. Under cross-examination, the first respondent admitted that he was not certain of the extent of the roaming and foraging area.

[17] Before the state authority approved the plan, investigations were conducted on the disputed lands which found no traces of aboriginal peoples occupation or settlement over the disputed lands.

Federal appellant's submission

[18] The second ground advanced by the federal appellants is that the order of the learned judge to *de-gazette* the Malay reserve land is in excess of jurisdiction.

[19] Learned counsel for the federal appellants argued that the declaration was not prayed for nor pleaded by the respondents in their application.

[20] Learned counsel also argued that the power to revoke the status of Malay reserve land lies in the hand of the *Menteri Besar* in consultation with the Ruler in Council (ss 3(i) and 4(i) of the Malay Reservation Enactment (FMS Cap 142)). Under art 89(1) of the Federal Constitution, any Malay reserve land *gazetted* before Merdeka Day may continue as a Malay reservation unless otherwise provided for by a subsequent enactment which needs to be passed by the State Legislative Assembly and each House of Parliament. Further, for any Malay reserve land that ceased its status, another land of a similar character must be procured as replacement (art 89(3) of the Federal Constitution).

[21] Learned counsel also added that there is nothing to stop the resondents from remaining on the portions of disputed land which have been declared as Malay reserve land. The respondents are not obliged to leave the areas that have been declared as Malay reserve lands (s 10 of the Aboriginal Peoples Act 1954 ('APA 1954')).

[22] Learned counsel argued that the learned judge was right in not granting any form of damages to the respondents. As such, the declaration to excise the portion of the Malay reservation to be given to the respondents is redundant to the existing rights under the APA 1954 that are enjoyed by the respondents.

The respondents' submission in reply

[23] In reply to the state appellant's arguments, learned counsel for the respondents referred to a map prepared by the Pengarah Perhutanan Negeri Pahang. According to the map, the area demarcated as 'Rezab Orang Asli Bukit Rok, Bera' contains an area of 2,023.47 hectares. The respondent moved away from the customary lands in 1971 due to floods; the rubber trees the respondents planted on the customary land remained. The move was only temporary and the respondents continued to be in occupation of the customary land. It is not necessary for the respondents to be in continuous occupation of the land in order to assert their native customary land rights.

[24] The learned judge was correct in finding that not all the customary lands were used for farming; the rest were utilised for hunting and foraging. The learned judge was also correct in ordering the disputed lands to be properly surveyed to take account of the fact that the area of the respondent's customary

lands has shrunk due to development by FELCRA.

[25] Learned counsel also argued that the investigations which found no traces of aboriginal settlements on the disputed lands is wrong as the map clearly shows that the area was cultivated by the respondents.

[26] In reply to the arguments of the federal appellants, learned counsel submitted that the APA 1954 does not extinguish the customary land rights of aboriginal people (*Sagong Tasi*). There are constitutional grounds for challenging the validity of the Malay reserve land under which the Bera Malay reservation order was made. Article 89(4) of the Federal Constitution provides that 'Nothing in this Article shall authorise the declaration as a Malay reservation of any land which at the time of the declaration is owned or occupied by a person who is not a Malay or in or over which such person has then any right or interest'.

[27] It was also argued that the Malay Reservation Enactment should be applied with the necessary modifications to bring it into accord with the Federal Constitution in particular, with art 89(4) and the special position of the aboriginal peoples conferred by art 8(5)(c). Read together with these articles, the Malay Reservation Enactment does not authorise the respondents' customary lands being declared as Malay reservation. Accordingly, the fact that a large part of the customary lands was *gazetted* in 1923 as Malay reservation lands does not detract from the fact that the customary lands were and remain ancestral lands of the respondents. As such, the respondents possess unextinguished and legally enforceable customary rights and interests to and over the customary lands. Therefore, there are constitutional grounds for challenging the validity of the Malay reservation enactment under which the Bera Malay reservation order was made. In the light of the findings of the learned judge, the order to *de-gazette* the portion of the Malay reserve land encroaching upon the customary lands is a consequential order.

ABORIGINAL PEOPLES' RIGHTS IN THEIR CUSTOMARY LAND

[28] The genesis of the recognition of the aboriginal peoples' proprietary right in their customary and ancestral land may be said to have taken root in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418. In that case, a group of aborigines living around the Sungai Linggui catchment area brought a representative action for a declaration that the lands acquired by the State Government for the construction of a dam was aboriginal area or aboriginal reserve and for compensation. The court recognised that aboriginal peoples had usufructuary rights (for use and enjoyment of land), rights over land but not in and to the land. The court found that aborigines had rights at common law over the land vested in the state and that such rights existed

despite the APA 1954. Accordingly, the aborigines were compensated for the loss of land use and livelihood over the land; but they were not compensated for the loss of their proprietary interests in and to the land.

[29] The finding of the High Court in the *Adong Kuwau* case was upheld by the Court of Appeal; an appeal to the Federal Court against the decision of the Court of Appeal was dismissed.

[30] The next significant development came about in *Sagong bin Tasi v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591, the aborigines of the Temuan tribe brought a representative action for unlawfully eviction from their lands following the acquisition of 38,477 acres of their land for the purposes of construction of the highway to the Kuala Lumpur International Airport. Whilst they received compensation for the loss of their crops, fruit trees and homes, they were not compensated for the loss of the land. Their claim for a proprietary interest in the land was not recognised by the Government. The eviction was conducted by a police operation with support of the FRU in the presence of officials from the Sepang District Office and of the Jabatan Hal Ehwal Orang Asli. The fruit trees and crops on the land were destroyed and their homes, cultural hall and community hall were demolished.

[31] The plaintiffs' claim was for recognition of their proprietary right to the land and compensation for breach of art 13 of the Federal Constitution and for trespass. The plaintiffs also contended that the government owed them a fiduciary duty based on constitutional provisions which required the government to protect and ensure the advancement and welfare of the aboriginal peoples in Malaysia.

[32] In the landmark decision, the High Court granted recognition to the aboriginal peoples' rights in and to the customary land and not merely the rights of use and enjoyment over the land. The High Court relied on the following authorities: *Amodu Tijani v Southern Nigeria Secretary* [1921] 2 AC 399; *Mabo v State of Queensland* (1993) 175 CLR 1; *Wik Peoples v The State of Queensland & Ors* (1996) 187 CLR 1; *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185 et al; *First Nations Summit et al, interveners* (1997) 153 DLR (4th); and *Johnson and Graham's Lessee v William M'Intosh* (1823) 21 US 681.

[33] The High Court recognised that the native title to the settled areas of the land taken, was a proprietary interest in and to the land, and ordered that compensation be paid to the plaintiffs under the Land Acquisition Act 1960. However, as the decision only dealt with settled areas of the land, the question of whether these rights extend to the areas where the aboriginal peoples roam, forage and hunt or fish was not settled.

DECISION

[34] To recapitulate, the first issue relates to the question of whether native customary rights extended to areas of lands used for hunting, roaming and foraging. The second issue relates to the question of whether a *gazetted* Malay reserve land takes precedence over any customary title.

[35] On the first issue, we note that the learned judge's finding is predicated on the following grounds:

(a) since the law recognises the rights of the aborigines over land it must also give rights and recognition of the customary activities carried out by the aborigines which includes hunting, roaming and foraging in the jungle;

(b) the provision of modern amenities does not preclude the aborigines from claiming the land for the purpose of foraging and roaming the jungle;

(c) the learned judge accepted the first respondent's testimony that foraging and roaming of the jungle was something which the community could not give up despite being provided the comforts of modern living;

(d) the area of the land to be alienated for the purpose of the aborigine community should take into the facts of each case into consideration, the size of the community and to what extent they should be allowed to roam and forage (*Alexkor Ltd v Richetersveld Community* [2003] 12 BCLR 130); and

(e) the learned judge agreed with the opinion of Dr Collins that the respondents' dependence on the land for sustenance and wellbeing still remains the same even though there had been a change of activities of Semelais from purely subsistence activities to more cash-based activities such as rubber and oil palm cultivation as well as small businesses.

[36] In *Sagong Tasi,* the learned judge had reviewed the international jurisprudence on the content of common law native title and the cases cited in para 28 above. The learned judge went on to hold that:

> Therefore in keeping with the worldwide recognition now given to aboriginal rights, I conclude that proprietary interest of the Orang Asli in the customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement, but not the jungles at large where they used to forage for their livelihood in accordance with their tradition. As to the area of settlement and its size, it is a question of fact in each case. In this case the land is clearly within their settlement. I hold that the plaintiff's proprietary interest in it is an interest in and to the land.

[37] The same sentiment was expressed by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and Anor*

Appeal. Hashim Yusoff JCA speaking for the Court of Appeal said at p 570:

> From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors* that the claim should not be extended to areas where they used to roam and forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.

[38] We do not think that *Alexkor Ltd v Richetersveld Community* supports the proposition that native land rights extended to areas of land used for hunting or foraging. The passage cited by the learned judge is as follows:

> In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and the LCC (Land Claims Court), we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the community. The community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface.

[39] In our view, if the words 'the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface' are read within the context of the whole passage, it is clear that the said words are intended to amplify the rights enjoyed by the community on the subject land. We do not agree that the said words can be interpreted to mean that the extent the respondents should be allowed to roam and forage is a factor to be considered in determining the area of the land to be alienated for the aboriginal community. The point made by the Constitutional Court of South Africa in *Alexkor's* case was that the Richtersveld Community had the right of ownership on the basis of exclusive use and occupation of the subject land.

[40] In our view, the distinction between settled and unsettled lands is not really important; what is more significant is whether there is exclusive occupation and continuous use of the subject land. In *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the Deceased, Salleh bin Kilong*, the Federal Court said that the proposition of law as enunciated in *Mabo (No 2)* [1992] 175 CLR 1 and *Calder v A-G (British Columbia)* [1973] SCR 313 reflected the common law position with regards to native titles throughout the Commonwealth. More pertinently, the Federal Court held that the determinant factor of native title is the element of control over the land exhibited by the claimant and not so much the use of the land. At p 694, Arifin Zakaria FCJ (as he then was) said:

On the issue of what is meant by 'occupation', we agree with the view of the Court of Appeal that actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exist sufficient measure of control to prevent strangers from interfering: see *Newcastle City Council v Royal Newcastle Hospital* [1959] 1 All ER 734; which was followed by the local case of *Hamit bin Matusin & Ors v Superintendent of Lands and Surveys & Anor* [1991] 2 CLJ 1524. Therefore, following the above authorities, the fact that the respondent ceased to live on the land prior to the fire which gutted the house on the land in 1941 that does not mean that he ceased to be in occupation of the said land. The evidence before the court clearly established that he continued to exercise control over the said land after the said period. The respondent could not, therefore, be said to have lost his right or interest over the said land by reason of abandonment or non-occupation of the said land.

[41] In the light of the principles enunciated in the abovementioned authorities, we agree with the state appellants that the native customary rights are established by the aborigines' occupation of the subject land. Whilst actual physical presence on the land is not necessary, there can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering. In this case, there is no evidence produced by the respondents to show that there exists sufficient let alone any measure of control to prevent strangers from interfering on the land. In fact, the first respondent admitted under cross-examination that he did not know the extent of the area used for roaming and foraging in Padang Kepayang; the uncertainty lends support to the state appellant's argument that the respondents do not have any measure of control at all on the disputed land of Padang Kepayang.

[42] Accordingly, we are constrained to hold that the learned judge misdirected himself on the law and on the facts in arriving at the finding that the area of the land to be alienated for the purposes of the aborigine community should include the area they should be allowed to roam and forage.

[43] There is one final point relating to the map prepared by the Pengarah Perhutanan Negeri Pahang referred to by learned counsel in support of the respondents' claim of native customary land in the Bera region. A close perusal of the documents in question shows that the map is in fact a plan attached to a 'SIJIL PEMBEBASAN HUTAN' (forest clearance certificate) dated 24 March 1983 pursuant to the Forest Rules 1987 ('FR 1987') under the National Forestry Act 1984. According to r 2 of the FR 1987, the words 'forest clearance certificate' means a document issued by the Director to confirm that the area specified therein does not contain any more timber which can be economically harvested'. Rule 5 of the FR 1987 provides that a forest clearance certificate may be issued by the Director if he is satisfied that the area under consideration does not contain any more timber that can be economically harvested and that

such clearance shall be as determined by the Director. With respect, we do not think that the plan attached to the forest clearance certificate supports the respondent's claim. The words 'Rezab Orang Asli Bukit Rok, Bera' is the 'Nama Kawasan' assigned to the area in question. It is not a certificate of the state authority recognising the area delineated as native customary land. It is a description and is at best indicative. At any rate, it must be borne in mind that the forest clearance certificate was issued for the specific purpose under r 5.

[44] We now turn to the second issue on the question of whether a *gazetted* Malay reserve land takes precedence over any customary title.

[45] According to renowned Malaysian historian Hj Buyong Adil in his *Sejarah Pahang* published by Dewan Bahasa dan Pustaka in 1984, the ancestors of today's Orang Asli groups lived in Pahang since the Middle Stone Age period. According to the expert report of Dr Collin G Nicholas, the presence and occupation of the Semelai people in the Bera Drainage Area, ranging from the mouth of the Bera river at Kuala Bera, along the whole stretch of the Bera River and into Tasek Bera is acknowledged in documentary materials from various sources. There were also several earliest available maps in the area which show or indicate the presence and occupation of the Semelai people in the Bera Drainage Area.

[46] According to the first respondent, his family tree dates back to six generations before himself. Counting himself and his own eight children and 12 grandchildren, there are today at least eight generations of Semelai living on the customary lands. Given that the Semelai of Bukit Rok and Ibam have been living in the customary lands for at least eight generations, it may be inferred that the Semelai of Bukit Rok and Ibam have occupied the customary lands for at least 240 years; that is to say since 1775.

[47] The point to note at the outset is that the Malaysian courts recognise the pre-existing native land rights of the aboriginal peoples. It has also to be accepted that by the common law even the Crown's acquisition of a radical title or ultimate title to the land did not confer absolute beneficial ownership of the land; and that the Crown's right or interest is subject to any native rights over such land. We would respectfully refer to the passage at p 692 of *Madeli* where Arifin Zakaria FCJ (as he then was) said:

> With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in Mabo (No 2) that by the common law, the Crown may acquire a radical title or ultimate title to the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy

Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes.

[48] In *Madeli*, the disputed land fell within the tract of land which was reserved as the Shell Concession Area pursuant to the Rajah Order made on 15 November 1921 ('the 1921 Order'). The 1921 Order also provided for the notification of the occupiers of the land under permit that the land so occupied belongs to the Government and that they will only be entitled to be compensated in respect of building erected or plant planted thereon. The land became an excepted area not earlier than 1954; as such the land was within the Shell Concession Area from 1921 and ending in 1954. By a *gazette* notification of 24 December 1982 ('the 1982 Notification'), the land was declared as a Government reserve for the purpose of a park. The respondent argued that the appellants should have paid him compensation for his native customary rights to the land before issuing the 1982 Notification. The state authorities had admitted that the respondent had acquired native customary rights over the disputed land prior to 1 January 1958 which by implication included the period commencing from 1954 to 1 January 1958.

[49] More significantly, in *Madeli* the Federal Court considered the question of whether the 1921 Order had the legal effect of extinguishing the native customary rights over the land falling within the Shell Concession Area. Arifin Zakaria FCJ (as he then was) said at p 696:

Let us consider the first point. It is not in dispute that the said land fell within the Shell Concession Area. But the real issue is; what is the legal effect of the 1921 Order on native customary rights over land falling within the Shell Concession Area which had been acquired or exercised prior to the 1921 Order. Does the 1921 Order have the effect of extinguishing those rights? The Court of Appeal relying on *Sugar Refining Co v Melbourne harbour Trust Commissioners* [1827] AC 343 adopted the statutory interpretation that 'a statute should not be held to take away rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.' In this regard we agree with the Court of Appeal that there is no provision interest 1921 Order seeking to extinguish the respondent's right over the said land. All it did was to reserve the specified area of Miri District for the purpose of the operation of the Sarawak Oilfields Limited. What then is the effect of the said 'reservation'. Reading the 1921 Order we are of the view that its effect is merely to reserve a specified area for the purposes of the operations of the Sarawak Oilfields Limited. Future use of the land so reserved are governed by the said order, but it did not go further to provide that land which are already in occupation by native under the customary laws ceased to have effect and continued occupation of the land by the natives shall become illegal. In the absence of such a provision in the 1921 Order, we agree with the Court of Appeal that the order could

A not be construed to have the effect of extinguishing the rights of the native over such land which had been in existence prior to the coming into force of the said order. Such a drastic measure needs to be expressed in clear language and cannot be derived by mere implication.

B We are also of the view that to construe the 1921 Order in the manner proposed by the appellants would give the Order a retrospective force. This is so because the respondent had been in occupation of the said land long before the 1921 Order. It is an established principle of construction of statute that prima facie a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless the result is unavoidable on the language use: see *Yew Bon Tew & Anor v* C *Kenderaan Bas MARA* [1983] 1 MLJ 1. We find the 1921 Order did not seek to do so. As we see it, the provisions of regulations 2 if al all is only applicable to future occupation of the land in the reserved area but not to the existing occupiers. In short we would venture to say that the reservation under the 1921 Order is subject to all existing rights under the native customs of land tenure. We hold that it is too far reaching a consequence to construe the 1921 Order to have the effect of D extinguishing all existing rights that had been in existence before the coming of James Brook. The 1921 Order did not expressly say so. (Emphasis added).

[50] In other words, Federal Court held that native customary land rights of E the aboriginal peoples can only be extinguished by clear, unambiguous and plain legislation or by an executive act expressly authorised by such legislation. To adopt the words of the Federal Court, such a 'drastic measure' must be justified in clear and unambiguous terms and not by mere implication.

F **[51]** In this instance, the Malay reserve land was *gazetted* in 1923 pursuant to the Malay Reservations Enactment 1913 ('1913 Enactment'). The 1913 Enactment is an Enactment to provide for securing to Malays their interests in land. Applying the principles enunciated in *Madeli*, the task of the court is to determine whether there is any provision in the 1913 Enactment which is G expressed in clear and unambiguous language to say that the *gazetted* Malay reserve land takes precedence over and in the customary land.

[52] What is the legal effect of a declaration of Malay reserve land? Under the 1913 Enactment, once a land is *gazetted* as Malay Reservation, all dealings in H the Malay reserve land are subject to restrictions. The restrictions relate to inter alia, the alienation of any Malay reserve land and transfer of any interest in Malay reserve land (ss 7 and 8), execution sales under a decree (s 9) and charge sales (s 10). It is also stipulated that all dealings or disposals and any attempts to deal or dispose in of Malay reserve land contrary to the 1913 Enactment I shall be null and void (s 13).

[53] There are altogether 16 sections in the 1913 Enactment. Other than the stipulation that any alienated land or state land may be included in a Malay reservation (s 5), there is no reference to customary title at all. In fact, there is

no provision to state that the Malay reserve land takes precedence over any customary title.

[54] On 15 December 1933, the Malay Reservations Enactment ('1933 Enactment') was enacted to amend and consolidate the law relating to Malay Reservation and to provide for securing to Malays their interests in land. The 1933 Enactment defined the words 'Malay Reservation' to include a Malay reservation declared and *gazetted* as a Malay reservation under the 1913 Enactment.

[55] The 1933 Enactment is more comprehensive and comprises of 21 sections. The category of land that may be included in a Malay reservation has been extended. In addition to alienated land and State land, any reserved forest or land reserved for a public purpose may now be included in a Malay reservation (s 5).

[56] The restrictions enumerated in the 1913 Enactment have also been consolidated and expanded to include restriction as to transfers, charges and leases (s 8), restriction as to dealings by attorneys (s 9), restriction as to caveats based on lien by deposit of title and other caveats (ss 10 and 11), restriction as to bank ruptcy (s 12), restriction as to attachments in execution (s 13), restriction as to trusts (s 14), restriction as to grants of probate and letters of administration (s 15) and sale by encumbrances (s 16). It is also provided that any Malay reserve land may be charged to the Government and to certain cooperatives (s 17). Lastly, there is a provision stipulating that the 1933 Enactment shall prevail against the provisions of other laws (s 21).

[57] There is no reference to customary land in the 1933 Enactment. In fact, the 1933 Enactment does not say that the Malay reserve land takes precedence over customary land. In the absence of a clear and unequivocal legislative intent to extinguish native customary land rights, we hold that the declaration under the 1913 Enactment of the Bera Malay Reservation does not extinguish the customary land rights of the aboriginal peoples.

[58] Analogous with the reservation order in *Madeli*, the Bera Malay reservation order of 1923 does not vest state land in any person; it only reserves the designated land as Malay reservation under the 1913 Enactment. The lands so designated remains state lands which is encumbered by the customary land right of the respondents.

[59] For the foregoing reasons, the second question is answered in the negative. Accordingly, we uphold the declaration of the learned judge that the portion of the Malay reserve land encroaching upon the customary land of the respondents and therefore has to be *de-gazetted*.

A CONCLUSION

[60] In the light of our findings, we allow the appeal in part. The area of the land to be alienated for the purpose of the aborigine community should be the settled areas and the areas under which are planted rubber trees, oil palm trees or other trees by the aborigine community. Accordingly, the order of the High Court dated 19 December 2012 is varied to the extent that the identification and drawing of boundaries of the respondents' customary land using natural boundaries of rivers and hills shall correspond as close as possible to the area claimed.

Appeal allowed in part and order of the High Court varied.

Reported by Ashok Kumar